PP

v.

CHUNG TSHUN TIN & ORS (NO 3)

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
HAMID SULTAN ABU BACKER JC
[CRIMINAL TRIAL NO: K 47-02-2002]
26 OCTOBER 2007

CRIMINAL PROCEDURE: *Sentence - Deterrent sentence - Dangerous drugs related offences - Drugs offences greatest social menaces faced by nation - Drugs offences are serious offences - Deterrent sentence to be imposed*

CRIMINAL PROCEDURE: *Sentence - Dangerous drugs related offences - Possession of 1599.9 grammes of Methamphetamine - Offence under s. 12(2) of Dangerous Drugs Act 1952 - Accused did not plead guilty and were found guilty as charged at end of defence case - Weight of drugs excessive - Sentence of life imprisonment and whipping of 24 strokes*

CRIMINAL PROCEDURE: *Sentence - Imprisonment for life - Amendments to s. 57 Penal Code - Substitution of twenty years to thirty years as life imprisonment - Whether amendment affected present case by virtue of art. 7 of Federal Constitution*

The accused persons were charged under s. 12(2) of the Dangerous Drugs Act 1952, an offence punishable under s. 39A(2) of the Act, for possession of 1599.9 grammes of Methamphetamine. All the three accused were found guilty as charged after hearing their defence. In mitigation, all the three accused claimed that they were victims of circumstances and that the offence would not have been committed had it not been for the act of the informer instigating them. The accused had been in prison for the last six years and pleaded leniency.

Held:

(1) The mitigation did not reflect any form of remorse on the part of the accused persons. The deterrent sentence allowed by law had to be imposed. Drugs offences are one of the greatest social menaces faced by the nation. Courts have expressly stated that drugs offences are serious offences and have dealt with it by imposing deterrent sentence. (paras 3 & 5)

(2) The accused did not plead guilty and were found guilty as charged at the end of the defence case. The weight of drugs was excessive. The accused were sentenced to life imprisonment and whipping of 24 strokes. Sentence to commence from date of arrest. (paras 5 & 6)

(3) The amendments in respect of s. 57 Penal Code have substituted twenty years to thirty years as life imprisonment. The new amendment will not affect this case by virtue of art. 7 of the Federal Constitution. (para 5)

(Order accordingly.)

Case(s) referred to:
Ang Chai Seng v. PP [2000] 1 CLJ 213 CA ***(refd)***
Balachandran Selvaratnam v. PP [2005] 1 CLJ 85 FC ***(refd)***
Leken Gerik (M) v. PP [2007] 8 CLJ 158 HC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
PP v. Erwin Hardy & Anor [2007] 9 CLJ 334 HC ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
PP v. Mohammad Ambunani [1994] 4 CLJ 871 HC ***(refd)***
PP v. Ooi Teng Chian [2005] 4 CLJ 557 CA ***(refd)***
PP v. Peter Kong (CT-45-11-2005-II) (Unreported) ***(refd)***
Surentheran Selvaraja v. PP [2005] 2 CLJ 264 CA ***(refd)***
Tia Ah Leng v. PP [2004] 4 CLJ 77 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 288, 289
Dangerous Drugs Act 1952, s. 39A(2)(r), 39B
Federal Constitution, art. 7

For the 1st & 2nd accused - Datuk Chau Chin Tang; M/s Yong Pei Yi; M/s Chau & Thien
For the 3rd accused - Patricia Hiew; M/s Fernandez & Co
For the prosecution - Suhaimi Ibrahim SFC (Raja Zaizul Faridah Raja Zaharudin) DPP

Reported by Amutha Suppayah

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] On 22 October 2007 I found all the 3 accused guilty as charged after hearing their defence. The charge read as follows:

That you all, on the 18th July, at about 11.40p.m., at the room number 1017, Tang Dynasty Hotel, in the District of Kota Kinabalu, in the State of Sabah, did have in your possession without lawful authority 1599.9 grammes of Methamphetamine and that you all have thereby committed an offence under Section 12(2) of the Dangerous Drugs Act 1952 and punishable under Section 39A(2)(r) of the same Act read together with Section 34 of the Penal Code.

Section 39A(2) of the Dangerous Drugs Act 1952 (DDA 1952) carries the maximum sentence of life imprisonment or for a term not less than five years and shall also be liable to whipping of not less than 10 strokes with the exception of female offender and male offender who is more than 50 years of age as set out in s. 289 of Criminal Procedure Code (CPC). The 1st accused in this case now is 29 years old, 2nd accused 39 years old while the 3rd accused is aged 37 years old. Based on s. 288 of CPC, the maximum number in respect of whipping in this case cannot exceed 24 strokes.

[2] The mitigation of all the 3 accused were similar. In short their counsel says (i) 1st offenders. (ii) they were victims of circumstances. (iii) had not been the act of the informer instigating the 2nd and 3rd accused to commit the crime, this offence will not have been committed and the 1st accused will not have been involved at all. (iv) had the defence of instigation been pleaded in other countries like America (not in the Commonwealth) it would have provided a total defence. (v) accused have been in prison for the last six years (vi) the accused have all suffered prejudice in that if the case had been heard within the period of 2001 to 2003, they would have been convicted for very negligible amount based on the law of procedure relating to chemist evidence. (vii) the Singaporean who could have thrown some light on the case was not produced by the prosecution. (viii) the 2nd accused is 39 years old and has 4 children and the 3rd accused is 36 years. (ix) plead leniency.

[3] I have read the mitigation in detail. It does not reflect any form of remorse on the part of the accused persons after the court having found them guilty as charged. Further, in this case the prosecution in a well articulated submission asserts that the court imposes the most deterrent sentence allowed by the law based on the following grounds:

(a) Drugs cases are serious offences and public interest demands a deterrent sentence imposed on drugs offenders and relies on the case of *Ang Chai Seng v. PP* [2000] 1 CLJ 213 where Haidar Mohd Nor JCA (as he then was) opined "We agree that the appellant committed a serious offence and the mitigating factors far outweigh in favour of the public interest". After sentencing the accused for 18 years imprisonment for possession of 81.4 grammes of morphine, His Lordship stated: "The sentence imposed may appear to be excessive but in our view the sentence having regards to the seriousness of the offence of dangerous drugs and the public interest as opposed to the appellant's interest , is not manifestly excessive". In *Balachandran a/l Selvaratnam v. PP* [2005] 1 CLJ 85, the Federal Court agreed with the sentence imposed by the High Court, that was 16 years imprisonment and 11 strokes of whipping for possession of 73.34 monoacetylmorphines and the grounds as stated by the High Court was reproduced in the Federal Court judgment and partly translated and reads as follows: "It cannot be denied that drugs offence is a serious offence in the eye of the authority and the public. It cannot be ignored that Public interest should be given priority in deciding the appropriate sentence for an offence of possession of dangerous drugs". In *PP v. Loo Choon Fatt* [1976] 2 MLJ 256, Hashim Yeop Sani J (as he then was) opined: "In my view, the courts will not be performing their function honestly if the seriousness of the situation (referring to drugs problem) is not reflected in the sentence imposed or if the sentence defeats the object of the statute". In *Tia Ah Leng v. PP* [2004] 4 CLJ 77 it was opined that: "the seriousness of the offences on drugs have been made known since the seventies. Eminent judges have expressed this in so many cases". In relying on the above cases, the learned DPP asserts that the sentence to be imposed must reflect the seriousness of the offence, the view of the public and the current situation of drugs problem in Malaysia and Sabah in particular.

(b) Further, the learned DPP says in this case that the total weight of the drugs was 1599.9 grammes which was more than 50 times the minimum weight provided under s. 39A(2)(r) which is 30 grammes. And says: "even if the weight was 30 grammes, the court can still impose life imprisonment sentence, what more if the amount was 1599.9 more than the minimum weight." And relies on the case of *PP v. Ooi Teng Chian*

[2005] 4 CLJ 557 where it was stated: "It is well established that sentencing in drugs offences must reflect the public interest to be served as it is an on-going national problem. The weight of the drugs involved is another factor to be considered. In this case, the amount of dangerous drugs involved is very substantial. In the circumstances neither the guilty plea of the accused nor the fact that he is a first offender can be considered too favourably in favour of the accused". And further relies on the case of *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734, where the Court of Appeal was of the view that: "As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it". Further, the learned DPP relies on the case of *Surentheran a/l Selvaraja v. PP* [2005] 2 CLJ 264, where the Court of Appeal opined: "there seems to be a statutory policy of grading the severity penalty according to the amount of drugs. Bearing that in mind, no matter how important are such questions as that of public interest, in a case that does not have aggravating or suchlike circumstances, such as a previous conviction – and the appellant does not have a previous conviction-the sentence of imprisonment must, as far as possible, though not necessarily with mathematical accuracy, be made to adhere to that policy. It would be manifestly wrong, for example, although allowed by s. 39A(2)(d), to sentence a first offender to life imprisonment for possession of a mere 5 grammes, as it would be manifestly wrong, although so allowed, to sentence an offender, even though a first offender, to only five years for possession of 14.999 grammes, in the absence of special mitigating circumstances". And asserts that in the same case, Abdul Aziz Mohamad JCA (as he then was) opined: "It would be manifestly wrong, for example, although allowed by s. 39A(2)(f), to sentence a first offender to life imprisonment for possession of a mere 50 grammes (cannabis), as it would be manifestly wrong, although so allowed, to sentence an offender, even though a first offender, to only five years for possession of 199.999 grammes, in the absence of special mitigating circumstances" (cannabis).

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(c) The learned DPP says that (i) all the three accused persons did not plead guilty even after the charge was reduced. (ii) as such no discount or credit should be given to them in the circumstances of this case and relies on the case of *Tia Ah Leng (supra)* and says that though the accused pleaded guilty, the court still imposed maximum sentence of life imprisonment on the accused. The Court of Appeal opined "It is true that the general rule is, when imposing a sentence, the court should take into account consideration the fact that an accused person who has pleaded guilty be given certain credit and discount, but we are of the view that there are exceptions to this rule. In our opinion one of these are the offences under the Dangerous Drugs Act 1952." (See *PP v. Mohammad bin Ambunai* [1994] 4 CLJ 871 and *PP v. Ooi Teng Chiang* [2005] 4 CLJ 557).

[4] I have dealt with the issue and principles of sentencing in my judgment of (i) *Leken Gerik (m) v. PP* [2007] 8 CLJ 158; (ii) *PP v. Erwin bin Hardy* [2007] 9 CLJ 334, sentencing delivered on 13 July 2007 (iii) Kuching High Court CT-45-11-2005-II *PP v. Peter Kong* sentencing delivered on 17 July 2007 which I adopt here and the relevant parts in the case of *Peter Kong (supra)* is reproduced here and reads as follows:

> … in addition, there are other guiding principles namely:
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> (a) The right measure of punishment for a crime is a matter regarding which no hard and fast rules can be laid down. It is to be determined by a consideration of a variety of circumstances.
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> (b) In imposing sentence, the main consideration is the character and magnitude of the offence. However, the Court cannot lose sight of the proportion which must be maintained between the offence and the penalty, and the extenuating circumstances which might exist in the case.
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> (c) Sentence should not be so harsh as to defeat the ends of justice. The quantum of sentence depends upon the gravity of the offence committed and the extenuating circumstances, if any. Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences.

(d) The zeal to crush an evil should not carry the court away from its judicial mind, and the sentence should not be so unduly harsh as to defeat the ends of justice.

(e) Imposition of severe or savage sentences against criminals is no longer recognised as proper in modern criminology and the deterrent or punitive aspect of punishment is no longer treated as a valid consideration in the administration of criminal law. Criminal law now treats punishment more as a reformative or corrective measure than as a deterrent or punitive measure. But even so, it would not be proper to adopt the same approach in dealing with every offence.

(See *Adamji Ume Dalal v. State of Bombay*, AIR [1952] SC 14 @ p. 4183 and *Union of India v. Kuldeep Singh*, AIR 2004 SC 827 @ p. 4193 of *Soonavala's Supreme Court Criminal Digest* (1950-2006) Fourth Edition 2007 Vol. 4).

(f) In *Mohamed Abdullah Ang Swee Kang v. Public Prosecutor* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 the Supreme Court said:

> In assessing the length of custodial sentence, the court must look at the overall picture in perspective by considering, firstly, the gravity of the type of offence committed; secondly, the facts in the commission of the offence; thirdly, the presence or absence of mitigating factors, and, fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any. The fact that a sentence of imprisonment is imposed as a deterrence does not justify the sentencer in passing a sentence of greater length than what the facts of the offence warrant. The gravity of the type of offence involved must be considered in the light of the particular facts of the offence.

(g) In *Tia Ah Leng v. PP* [2004] 4 CLJ 77, the Court of Appeal emphasized the seriousness of drug cases and the Court opined:

…

(h) In *Bachik bin Abdul Rahman v. PP* [2004] 2 CLJ 572, the Court of Appeal explains that although it is generally accepted that an accused who pleads guilty ought to be given a discount till as much as a third of the sentence which would be imposed upon him but for the plea of guilty. This is not a strict rule as the court may, in the exercise of its

A discretion, refuse to grant any discount in an appropriate case, depending upon the facts and circumstances of the case.

(i) In *PP v. Ooi Teng Chian* [2005] 4 CLJ 557 the Court of Appeal stated:

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> It is well established that sentencing in drug offences must reflect the public interest to be served as it is an on-going national problem. The weight of the drugs involved is another factor to be considered. In this case, the amount of dangerous drugs involved is very substantial. In such circumstances, neither the guilty plea of the accused nor the fact that he is a first offender can be considered too favourably in favour of the accused.

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D (j) For drug offence special consideration need to be observed. In *Union of India v. Kuldeep Singh*, AIR [2004] SC 827, the court opined:

> An offence relating to narcotic drugs or psychotropic substances is more heinous than a culpable homicide E because the latter affects only an individual while the former affects and leaves its deleterious impact on the society, besides shattering the economy of the nation as well. That the legislature intended to make the offences under the Act so serious to be dealt with sternly and with an iron hand is made clear by F providing for enhanced penalties, including even death sentence, in certain class of cases, when convicted for the second time.
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> The social impact of the crime eg, where it relates to G offences relating to narcotic drugs or psychotropic substances which have great impact not only on the health fabric but also on the social order and public interest, cannot be lost sight of and *per se* requires exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic view H merely on account of lapse of time or personal inconveniences in respect of such offences will be result wise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by a string of deterrence inbuilt in the sentencing system. I

7. Having said the above, the court must not forget that the anchored principles in sentencing is that punishment in criminal cases must be punitive as well as reformative. In *Karamjit Singh v. State (Delhi Admin.)* AIR [2000] SC 3467, the court opined:

> Punishment in criminal cases is both punitive and reformative. The purpose is that the person found guilty of, committing the offence is made to realise his fault and is deterred from repeating such acts in future. The reformative aspect is meant to enable the person concerned to relent and repent for his action and make himself acceptable to the society as a useful social being. In determining the question of proper punishment in a criminal case, the Court has to weigh the degree of culpability of the accused, its effect on others and the desirability of showing any leniency in the matter of punishment in the case. An act of balancing is, what is needed in such a case; a balance between the interest of the individual and the concern of the society, weighing the one against the other imposing a hard punishment on the accused serves a limited purpose but at the same time, it is to be kept in mind that relevance of deterrent punishment in matters of serious crimes affecting society should not be undermined. Within the parameters of the law an attempt has to be made to afford an opportunity to the individual to reform himself and lead life of a normal, useful member of society and make his contribution in that regard. Denying such opportunity to a person who has been found to have committed offence in the facts and circumstances placed on record would only have a hardening attitude towards his fellow beings and towards society at large. Such a situation, has to be avoided, again within the permissible limits of law. We have come to the conclusion that some consideration should be shown to the appellant in the matter.

8. In my view, an offence under section 39(A)(2) of DDA 1952 must be dealt with severely. To reflect the gravity of the offence, maximum whipping will be seen as a deterrent. I have stated my reasons for this in *Leken @ Delem Ak Gerik (m) (supra)* and it reads as follows:

> … And for this purpose the sentence of whipping is sufficient deterrence to reflect the seriousness of the offence rather than imprisonment. My reasons are as follows:

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(a) Section 376B provides for imprisonment as well as whipping. Whipping is seen to be a form of deterrent as well as rehabilitative sentence and enjoys the status of retributive punishment as well. From time immemorial and at least one major religion has made it mandatory for certain grave and serious offences as well as unchaste act without the necessity for imprisonment. Whipping did not find a place in the common law jurisprudence.

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Whipping has a practical and tactical significance in that even ferocious mammals have been trained by a cane, notwithstanding the fact that it can also be achieved by love and affection. By analogy, in my view unacceptable human conduct in criminal offenders in case of moral offences can sufficiently be arrested by the sentence of whipping. And that appears to be the intention of parliament for rampantly introducing whipping for serious offences. In case of violent offenders, it is necessary to provide in addition to whipping, long term imprisonment to reflect the gravity and seriousness of the offence and to keep the offenders out of criminal mischief. They must not be released early as they may be an immediate threat to the society. However, in the case of unchaste act between consenting parties, and for the first time offenders, the punishment of whipping without the need for long term imprisonment will be a sufficient deterrent and effective form of rehabilitation and to some extent will be seen as retributory punishment to heal the unseen wounds of the victim, their family, as well as the public sentiments for harsh punishment for perpetrators of the sin …

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[5] I adopt here the principles set out in the above cases. I agree with the prosecution that the most deterrent sentence allowed by law must be imposed in this case. My reasons are as follows:

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(i) Drugs offences are one of the greatest social menaces faced by the nation. These anti social activities are much more serious than murder though murder attracts capital punishment. The offence of murder is always related to the destruction of one person i.e. the victim and incidentally the relevant families. However, drugs, its distribution, etc. destroys a section of the society; though it may not be instaneous, it is cancerous. Further, it also retards the economic growth of the nation by

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compromising or making its citizen non-productive. Courts have expressly stated that drugs offences are serious offences and have dealt with it by imposing deterrent sentence. In *Tia Ah Leng (supra)*, the Court of Appeal observed:

> … In *Public Prosecutor v. Oo Leng Swee & Ors* [1980] 1 LNS 189; [1981] 1 MLJ 247 at p. 248, Suffian LP (as he then was) stated:
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> > It is true that all the accused are first offenders. But drug addiction has been rampant for many years, and has reached very serious proportions. It is notorious that many addicts are young persons, many of them innocent children of decent families. Many addicts because of their craving are driven to commit crimes, in order to acquire money desperately needed to buy dadah; and almost daily we read reports of young men on motor - cycles snatching ladies' handbags in town in broad daylight - or worse. Many of these addicts are eventually destroyed by the deleterious effects of the drugs which they are not able to shake off, but before that lamentable event they go through living death.
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> Raja Azlan Shah, CJ Malaya (His Majesty as he then was) in *Loh Hock Seng & Anor v. Public Prosecutor* [1979] 1 LNS 48; [1980] 2 MLJ 13 had this to say at p. 14:
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> > Notwithstanding the several convictions for trafficking in drugs that have been secured, the rampancy of the this type of offence still continues unabated with sequential impetus to related offences under the Ordinance, and in view of the current and continuing upsurgence of indulgence in dangerous and deleterious drugs and offences relating to and connected therewith, we feel the time has now come for some more vigorous element of deterrence to be brought to bear upon those trafficking in drugs, both active and potential, who are no less than engineers of evil and pedlars of death, to the intent and extent that intending offenders should be made to desist and be deterred, that those one step ahead and in the course of promoting or participating in such heinous activity should realise the extremely grave consequences they face, stop dead in their tracks, repent and resile, and that those who, notwithstanding still pertinaciously persist and have the misfortune of being apprehended, should know they are in for the punishment prescribed

A by law to fit the crime. As was said by Abdoolcader J, in *Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* trafficking in drugs strikes at the very core of public order, and he went on to add (at page 88):

B Trafficking in drugs is a crime which also affects public health and public safety and can indeed be the spawn or nidus of crimes that ultimately result in violence or at least have a shattering effect on public tranquility and society generally.

C The effort of the legislature to curb and deter drug - related offences is well described by Hashim Yeop A. Sani (as he then was) in *Public Prosecutor v. Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ 256 at p. 257: …

D Turning back to the present appeal, the appellant was originally charged for trafficking in dangerous drugs under s. 39B of the Dangerous Drugs Act 1952 which carries a mandatory death sentence. He claimed trial to the charge and as a result of that a full trial took place. At the end of the trial, ie, at the E close of the defence case, the learned judge amended the charge to one under s. 12(2) of the Act and punishable under s. 39A(2) presumably due to lack of evidence of trafficking. The appellant then pleaded guilty to the lesser charge. In admitting the facts, the F appellant also admitted that the heroin amounting to 13,749.80 grammes was found in his car.

In our view, 13,749.80 grammes (13.74 kilogrammes) of heroin is a huge amount. One can just imagine the amount of damage done if this heroin found its way G to the public at large. It would cause hundreds if not thousands of drug addicts more miseries and some of them, deaths. The appellant, if he had been successful in distributing and selling the heroin, would be laughing all the way to the bank. We are of the view that this is one case in which no credit or H discount should be given even though the appellant had pleaded guilty to the amended charge. In our view, the appellant was fortunate that the prosecution failed to prove trafficking which carries the mandatory death sentence.

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(ii) In this case the accused was charged under s. 39B of DDA 1952 which carries mandatory sentence. The charge was amended at the end of prosecution case to s. 12(2) of the Act punishable under s. 39A(2). The accused persons did not plead guilty and were found guilty as charged at the end of the defence case. The weight of drugs in this case is excessive when compared to the other two cases which I have dealt with namely (i) *Erwin bin Hardy (supra)* and (ii) *Peter Kong (supra)*. In both these cases, the accused had pleaded guilty to the amended charge. The weight of drugs in *Erwin bin Hardy*'s case *(supra)* was 117.16 grammes of methamphetamine and the sentence was 10 years imprisonment and whipping of 24 strokes whereas in *Peter Kong*'s case *(supra)* the weight was 127.14 grammes of methamphetamine and sentence was 15 years imprisonment and whipping of 10 strokes.

(iii) In this case, I am minded to impose the maximum sentence of life imprisonment and whipping taking into circumstance the facts of this case, the weight of the drugs and the mitigation of the counsel. The law on life imprisonment has recently been amended.

(a) The amendments in respect of s. 57 Penal Code (effective date on 7 September 2007) has substituted twenty years to thirty years as life imprisonment. But the amendments only apply to offences under Penal Code.

(b) In respect of offences under laws other than the Penal Code which includes the DDA 1952, the Criminal Justice Act 1953 (Act 345) provides under s. 3 that: "Where any person is treated as having been sentenced or is hereafter sentenced to imprisonment for life, such sentence shall be deemed for all purposes to be a sentence of imprisonment for thirty (30) years".

(iv) The new amendment will not affect this case by virtue of art. 7 of the Federal Constitution which says that:

> (1) No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.

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(2) A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted.

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[6] For reasons stated above, I sentence the accused persons as follows:

(i) **1st accused**

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Life imprisonment and whipping of 24 strokes. Sentence to commence from date of arrest.

(ii) **2nd accused**

Life imprisonment and whipping of 24 strokes. Sentence to

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commence from date of arrest.

(iii) **3rd accused**

Life imprisonment and whipping of 24 strokes. Sentence to commence from date of arrest.

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I hereby order so.

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